

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

JO ANN HOWARD AND ASSOCIATES, P.C.,	)	
SPECIAL DEPUTY RECEIVER OF LINCOLN	)	
MEMORIAL LIFE INSURANCE COMPANY,	)	
MEMORIAL SERVICE LIFE INSURANCE	)	
COMPANY, AND NATIONAL	)	
PREARRANGED SERVICES, INC., ET AL.,	)	
	)	
Plaintiffs,	)	Case No. 4:09CV01252 ERW
v.	)	
	)	
J. DOUGLAS CASSITY; RANDALL K.	)	
SUTTON; BRENT D. CASSITY; J. TYLER	)	
CASSITY; RHONDA L. CASSITY; ET AL.,	)	
	)	
Defendants.	)	

---

**PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS  
AND ELECTRONICALLY STORED INFORMATION BY DEFENDANTS  
HOWARD A. WITTNER AND WITTNER, SPEWAK & MAYLACK, P.C.**

---

Plaintiffs respectfully move this Court to compel the production of all documents and electronically stored information by Defendants Howard A. Wittner and Wittner, Spewak & Maylack, P.C. ("Defendants") identified in their joint initial disclosure statement, as required by both Local Rule 26-3.01(A) and this Court's Interim Case Management Order.

1. Under Local Rule 26, "[d]isclosure of documents and electronically stored information pursuant to Rule 26(a)(1)(A)(ii) shall be made by providing a copy to all other parties, except as otherwise ordered by the Court." E.D. Mo. Local Rule 26-3.01(A).

2. The Court's Interim Case Management Order, issued June 27, 2011, required all parties to "serve initial disclosures and produce all documents as required by Fed. R. Civ. P. 26(a)(1) and E.D. Mo. Local Rule 26-3.01" on or before August 22, 2011. [Doc. 734.]

3. On August 22, 2011, Defendants provided Plaintiffs with their disclosures pursuant to Fed. R. Civ. P. 26(a)(1). (Ex. A-1 to Fisher Declaration, attached as Ex. A.)

4. Defendants' disclosures listed the following as "documents and tangible things in Defendants' custody or control that may be used to support its [sic] claims": (1) correspondence and e-mails to and from various individuals concerning the numerous allegations contained in the Complaint; (2) documents pertaining to PLICA, including documents relating to amounts PLICA paid to outside counsel and to outside vendors and documents pertaining to the purchase of PLICA; (3) First National Bank bank statements; and (4) RBT Trust tax returns. (Ex. A-1, at 2.) Defendants' disclosures also identified an insurance policy with Travelers Insurance Company that may apply to this case. *Id.*

5. Defendants did not produce copies of any documents or electronically stored information listed in their initial disclosures to Plaintiffs, as required by Local Rule 26-3.01(A) and the Interim Case Management Order.

6. Plaintiffs have made a good-faith attempt to resolve this dispute without Court intervention. (*See* Fed. R. Civ. P. 37(a)(1); E.D. Mo. Local Rule 37-3.04(A)). On October 21, 2011, and December 13, 2011, counsel for Plaintiffs sent correspondence to counsel for Defendants, requesting that Defendants produce copies of the documents and electronically stored information identified in Defendants' initial disclosures. (Exs. A-2, A-3). Counsel for Plaintiffs and counsel for Defendants conferred by telephone on December 15, 2011. During that call, counsel for Defendants, Mr. Todd Lubben, was unable to confirm that documents

would be forthcoming. Mr. Lubben stated that he would try to collect the documents for production, but he made no further contact with Plaintiffs' counsel until Plaintiffs' counsel provided notice of this impending motion. Mr. Lubben has recently indicated to Plaintiffs' counsel that he has collected "some documents" from his clients, but has not obtained his clients' approval to produce them.

7. Counsel for Defendants has also informed counsel for Plaintiffs that the federal Government in the related criminal action has copies of the documents on which Defendants will rely. Defendants suggest this relieves them of their obligation to produce their initial disclosure documents in this case because Plaintiffs have access to the Government's documents.

8. Defendants cannot satisfy their disclosure obligations, however, by contending that the documents are otherwise accessible to Plaintiffs. *See St. Paul Reinsur. Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000) (holding, in response to objection that documents were available in propounding party's records, "[C]ourts have unambiguously stated that this exact objection is insufficient to resist a discovery request."); *Jackson v. W. Va. Univ. Hosps., Inc.*, No. 1:10CV107, 2011 WL 1831591, at \* 2-4 (N.D. W. Va. May 12, 2011) (compelling production of initial disclosure documents and collecting cases establishing that the availability of documents through alternative sources is not a basis to avoid production). Under Local Rule 26-3.01(A) and the Interim Case Management Order, Defendants must produce copies of their initial disclosure documents in addition to simply identifying them. Indeed, Rule 26(a)(1) contemplates that parties be able to obtain copies of documents described in initial disclosures by informal request. Fed. R. Civ. P. 26(a)(1)(B) advisory committee's note (1993). Furthermore, a vague reference to a voluminous set of documents within the

Government's possession and requiring Plaintiffs to guess as to which documents Defendants plan to rely on does not fulfill Defendants' Rule 26(a)(1) disclosure obligations.

9. Counsel for Plaintiffs informed the Court and counsel for Defendants at the status conference on December 16, 2011, that a motion to compel these documents was forthcoming. (Ex. A-4, Hearing Transcript, 12/16/2011, at 9-10.)

10. Accordingly, Plaintiffs seek to compel production of all of the documents and electronically stored information listed in Defendants' initial disclosure statement, as well as the Travelers Insurance Company policy.

WHEREFORE, Plaintiffs respectfully request that the Court issue an order under Fed. R. Civ. Pro. 37(a)(1) requiring Defendants Howard A. Wittner and Wittner, Spewak & Maylack, P.C. to produce to Plaintiffs copies of all of the documents and electronically stored information listed in their Rule 26(a)(1) initial disclosure statement, as well as the Travelers Insurance Company policy, pursuant to the Interim Case Management Order and Local Rule 26.301(A). Plaintiffs also ask the Court for reasonable expenses incurred in making this motion, including reasonable attorney's fees. *See* Fed. R. Civ. P. 37(a)(5)(A); *Dykes v. Mitchell*, No. 4:07-CV-733 CAS, 2008 WL 544983, at \*1-2 (E.D. Mo. Feb. 26, 2008) (award of fees and expenses incurred in connection with motion to compel is appropriate where a party fails to timely produce initial disclosures without justification). The requested format for production of documents is set forth in the Stipulation of the Parties on Production of Hard Copy Documents and Electronically Stored Information. [Doc. 733.]

Dated this 12th day of January, 2012.

Respectfully submitted,

s/ Wendy B. Fisher

Daniel M. Reilly (Admitted *Pro Hac Vice*)  
Larry S. Pozner, E.D. Missouri Bar No. 2792CO  
Wendy B. Fisher (Admitted *Pro Hac Vice*)  
Glenn E. Roper (Admitted *Pro Hac Vice*)  
Clare S. Pennington (Admitted *Pro Hac Vice*)  
Farrell A. Carfield (Admitted *Pro Hac Vice*)  
Reilly Pozner LLP  
1900 16<sup>th</sup> Street, Suite 1700  
Denver, CO 80202  
(303) 893-6100

Maurice B. Graham, Bar No. 3257  
Morry S. Cole, Bar No. 77854  
Gray, Ritter & Graham, P.C.  
701 Market Street, Suite 800  
St. Louis, MO 63101  
(314) 241-5620

Attorneys for Plaintiffs Jo Ann Howard and Associates,  
P.C., Special Deputy Receiver of Lincoln Memorial Life  
Insurance Company, Memorial Service Life Insurance  
Company, and National Prearranged Services, Inc.; the  
National Organization of Life and Health Insurance  
Guaranty Associations; the Missouri Life & Health  
Insurance Guaranty Association; the Texas Life & Health  
Insurance Guaranty Association; the Illinois Life & Health  
Insurance Guaranty Association; the Kansas Life & Health  
Insurance Guaranty Association; Oklahoma Life & Health  
Insurance Guaranty Association; the Kentucky Life &  
Health Insurance Guaranty Association; and the Arkansas  
Life & Health Insurance Guaranty Association.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2012, the foregoing PLAINTIFFS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION BY DEFENDANTS HOWARD A. WITTNER AND WITTNER, SPEWAK & MAYLACK, P.C. was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

Adam Goffstein  
Email: [adam@goffsteinlaw.com](mailto:adam@goffsteinlaw.com)  
Adam M. Goffstein, LLC  
7777 Bonhomme Avenue, Suite 1910  
St. Louis, MO 63105  
*Attorney for Defendant Katherine Scannell*

Barry A. Short  
Email: [bshort@lewisrice.com](mailto:bshort@lewisrice.com)  
Evan Z. Reid  
Email: [ereid@lewisrice.com](mailto:ereid@lewisrice.com)  
Carine M. Doyle  
Email: [cdoyle@lewisrice.com](mailto:cdoyle@lewisrice.com)  
Lewis, Rice & Fingersh, LC  
600 Washington Avenue, Suite 2500  
St. Louis, MO 63101  
*Attorneys for Defendant Brent Cassity*

Bogdan Rentea  
Email: [brente@rentealaw.com](mailto:brente@rentealaw.com)  
Rentea & Associates  
1002 Rio Grande  
Austin, TX 78701  
*Attorney for Defendant  
Lennie J. Cappelman*

Bruce A. Lipshy  
Email: [blipshy@lipshylaw.com](mailto:blipshy@lipshylaw.com)  
Lipshy, Stonecipher & Lemke LLP  
700 Lavaca Street, Suite 405  
Austin, TX 78701-3100  
*Attorney for Marianne Jones*

Burton H. Shostak  
Email: [bshostak@shostaklawfirm.com](mailto:bshostak@shostaklawfirm.com)  
Shostak & Shostak, LLC  
The Berkley Building  
8015 Forsyth Boulevard  
St. Louis, MO 63105  
*Attorney for Defendant Randall K. Sutton*

Jeffrey T. Demerath  
Email: [jdemerath@armstrongteasdale.com](mailto:jdemerath@armstrongteasdale.com)  
Christopher R. LaRose  
Email: [clarose@armstrongteasdale.com](mailto:clarose@armstrongteasdale.com)  
Armstrong Teasdale LLP  
7700 Forsyth Blvd., Suite 1800  
St. Louis, MO 63105-1847  
*Attorneys for Defendants Southwest Bank and  
Marshall & Ilsley Trust Company, N.A.*

Mike W. Bartolacci  
Email: [mbartolacci@thompsoncoburn.com](mailto:mbartolacci@thompsoncoburn.com)  
Christopher M. Hohn  
Email: [chohn@thompsoncoburn.com](mailto:chohn@thompsoncoburn.com)  
Kimberly M. Bousquet  
Email: [kbousquet@thompsoncoburn.com](mailto:kbousquet@thompsoncoburn.com)  
Thompson Coburn, LLP  
One US Bank Plaza, Suite 26  
St. Louis, MO 63101  
*Attorneys for Defendant National City Bank*

Sandra J. Wunderlich  
Email: [swunderlich@stinson.com](mailto:swunderlich@stinson.com)  
Stinson Morrison Hecker, LLP  
7700 Forsyth Blvd., Suite 1100  
St. Louis, MO 63105-1821  
*Attorneys for Defendant U.S. Bank, N.A.*

Danielle E. deBenedictis  
Email: [Ddeb95@aol.com](mailto:Ddeb95@aol.com)  
deBenedictis, Miller & Blum, P.A.  
95 Commercial Wharf  
Boston, MA 02110  
*Attorney for Rhonda L. Cassity, Inc., a/k/a Wellstream, Inc.*

Darren S. Enenstein  
Email: [dse@enensteinlaw.com](mailto:dse@enensteinlaw.com)  
David Z. Ribakoff  
Email: [dribakoff@enensteinlaw.com](mailto:dribakoff@enensteinlaw.com)  
Robert A. Rabbat  
Email: [rrabbat@enensteinlaw.com](mailto:rrabbat@enensteinlaw.com)  
Enenstein & Ribakoff, APC  
233 Wilshire Blvd., Suite 900  
Santa Monica, CA 90401  
*Attorneys for Defendants Tyler Cassity and Hollywood Forever, Inc.*

David B. Cosgrove  
Email: [dcosgrove@cosgrovelawllc.com](mailto:dcosgrove@cosgrovelawllc.com)  
Kurt J. Schafers  
Email: [kschafers@cosgrovelawllc.com](mailto:kschafers@cosgrovelawllc.com)  
Cosgrove Law, LLC  
Magna Place  
1401 S. Brentwood Blvd., #560  
St. Louis, MO 63144  
*Attorneys for Defendant Anne Chrun*

David H. Luce  
Email: [dhl@carmodymacdonald.com](mailto:dhl@carmodymacdonald.com)  
Meghan M. Lamping  
Email: [mmml@carmodymacdonald.com](mailto:mmml@carmodymacdonald.com)  
Carmody MacDonald P.C.  
120 S. Central Ave., Suite 1800  
St. Louis, MO 63105  
*Attorneys for Defendant Michael R. Butler*

E. Calvin Matthews, IV  
Email: [ecm@gpslegal.com](mailto:ecm@gpslegal.com)  
Jim J. Shoemake  
Email: [jjs@gpslegal.com](mailto:jjs@gpslegal.com)  
Deborah J. Westling  
Email: [djw@gpslegal.com](mailto:djw@gpslegal.com)  
Eric M. Walter  
Email: [emw@gpslegal.com](mailto:emw@gpslegal.com)  
Guilfoil Petzall & Shoemake, L.L.C.  
100 South Fourth Street, Suite 500  
St. Louis, MO 63102-1821  
*Attorneys for Defendant Randall K. Sutton*

Deirdre C. Gallagher  
Email: [dgallagher@foleymansfield.com](mailto:dgallagher@foleymansfield.com)  
Foley & Mansfield PLLP  
1001 Highlands Plaza Drive West, Suite 400  
St. Louis, MO 63110  
*Attorney for Defendant J. Tyler Cassity and Hollywood Forever, Inc.*

Gary E. Snodgrass  
E-mail: [snodgrass@pspclaw.com](mailto:snodgrass@pspclaw.com)  
Steven J. Hughes  
E-mail: [hughes@pspclaw.com](mailto:hughes@pspclaw.com)  
Jaime N. Ott  
E-mail: [ott@pspclaw.com](mailto:ott@pspclaw.com)  
Pitzer Snodgrass, P.C.  
100 South Fourth Street, Suite 400  
St. Louis, Missouri 63102  
*Attorneys for Defendant Brown Smith Wallace, L.L.C.*

Donald W. Holcomb  
Email: [dwh@khkclaw.com](mailto:dwh@khkclaw.com)  
Knolle and Holcomb  
7600 N. Capital of Texas Highway  
Building B, Suite 110  
Austin, TX 78731  
*Attorney for Wise, Mitchell and Associates*

Firmin A. Puricelli  
Email: [firminap@gmail.com](mailto:firminap@gmail.com)  
Law Offices of Firmin A. Puricelli  
120 South Central Ave., Ste. 130  
St. Louis, MO 63105-1705  
*Attorney for Defendants Forever Enterprises, Inc., Forever Network, Inc., Forever Illinois, Inc., Texas Forever, Inc., Lincoln Memorial Services, Inc., National Heritage Enterprises, Inc., National Prearranged Services Agency, Inc., Legacy International Imports, Inc., and Brentwood Heritage Properties, L.L.C*

James M. Golden  
Email: [jgolden@dykema.com](mailto:jgolden@dykema.com)  
Richard E. Gottlieb  
Email: [rgottlieb@dykema.com](mailto:rgottlieb@dykema.com)  
Renee L. Zipprich, *pro hac vice*  
Email: [rzipprich@dykema.com](mailto:rzipprich@dykema.com)  
Jeffrey E. Jamison  
Email: [jjamison@dykema.com](mailto:jjamison@dykema.com)  
Dykema Gossett PLLC  
10 South Wacker Drive, Suite 2300  
Chicago, IL 60606  
*Attorneys for Defendant Comerica Bank & Trust, N.A.*

Joseph P. Whyte  
Email: [jwhyte@whytelawfirm.com](mailto:jwhyte@whytelawfirm.com)  
The Whyte Law Firm  
P.O. Box 440236  
2025 South Brentwood Blvd., Suite 102  
St. Louis, MO 63144-0236  
*Attorney for Defendant Comerica Bank & Trust, N.A*

Jay L. Kanzler Jr.  
Email: [jaykanzler@wklc.com](mailto:jaykanzler@wklc.com)  
Witzel Kanzler Kenney Dimmitt & Kanzler LLC  
2001 S. Big Bend Boulevard  
St. Louis, MO 63117  
*Attorney for Defendant American Stock Transfer and Trust Company*

Thomas Cummings  
Email: [tcummings@armstrongteasdale.com](mailto:tcummings@armstrongteasdale.com)  
Jonathan D. Valentino  
Email: [jvalentino@armstrongteasdale.com](mailto:jvalentino@armstrongteasdale.com)  
Armstrong Teasdale LLP  
One Metropolitan Square, Suite 2600  
St. Louis, MO 63102-2740  
*Attorneys for Defendant Bremen Bank and Trust Company*

Jonathan F. Andres  
Email: [andres@stlouislaw.com](mailto:andres@stlouislaw.com)  
Green Jacobson, P.C.  
7733 Forsyth Boulevard, Suite 700  
Clayton, MO 63105  
*Attorneys for Defendants Wulf and Wulf, Bates & Murphy, Inc.*

Joseph L. Green  
Email: [joe@josephgreenlaw.com](mailto:joe@josephgreenlaw.com)  
The Law Firm of Joseph Green  
#1 McBride and Sons Center Dr., Ste. 225A  
Chesterfield, MO 63005  
*Attorney for Defendant Nekol Province*



Kerri K. Fields  
Email: [kerrikfields@1stcounsel.com](mailto:kerrikfields@1stcounsel.com)  
[kerrikfieldslaw@msn.com](mailto:kerrikfieldslaw@msn.com)

P. O. Box 1089  
Bastrop, TX 78602  
*Attorney for George Wise, III*

Michael Jesse Carlson  
Email: [mcarlson@wc.com](mailto:mcarlson@wc.com)

Paul M. Wolff  
Email: [pwolff@wc.com](mailto:pwolff@wc.com)

Grace L. Hill  
Email: [ghill@wc.com](mailto:ghill@wc.com)

J. Andrew Keyes  
Email: [akeyes@wc.com](mailto:akeyes@wc.com)  
Williams & Connolly, LLP  
725 Twelfth Street, N.W.  
Washington, D.C. 20005  
*Attorney for Defendant National City Bank*

John Mark Hongs  
Email: [jhongs@hinshawlaw.com](mailto:jhongs@hinshawlaw.com)  
Hinshaw & Culbertson LLP  
Gateway One  
701 Market Street, Suite 1300  
St. Louis, MO 63101-1843  
*Attorney for Defendant Comerica Bank & Trust, N.A.*

Steven A. Muchnick  
Email: [steven.muchnick@usdoj.gov](mailto:steven.muchnick@usdoj.gov)  
Office of U.S. Attorney  
111 S. Tenth Street, 20th Floor  
St. Louis, MO 63102

Perry Brandt  
Email: [perry.brandt@bryancave.com](mailto:perry.brandt@bryancave.com)  
Jeffrey A. Ziesman  
Email: [jeff.ziesman@bryancave.com](mailto:jeff.ziesman@bryancave.com)  
Bryan Cave, LLP  
3500 One Kansas City Place  
1200 Main Street  
Kansas City, MO 64105  
*Attorney for Defendant Bank of America, N.A.*

Steven H. Schwartz  
Email: [sschwartz@bjpc.com](mailto:sschwartz@bjpc.com)  
Todd A. Lubben  
Email: [tlubben@bjpc.com](mailto:tlubben@bjpc.com)  
Brown & James, P.C.  
1010 Market Street, 20<sup>th</sup> floor  
St. Louis, MO 63101  
*Attorney for Defendants Howard A. Wittner, individually and as Trustee of the RBT Trust II and Wittner, Spewak & Maylack, P.C.*

Steven M. Cohen  
Email: [scohen@bcbslaw.com](mailto:scohen@bcbslaw.com)  
Berger, Cohen & Brandt, L.C.  
8000 Maryland Ave., Suite 1550  
Clayton, MO 63105  
*Attorneys for Defendant Roxanne J. Schnieders (Sargent)*

I hereby certify that on January 12, 2012, the foregoing was mailed by United States Postal Service to the following non-participants in Electronic Case Filing:

Randall J. Singer  
10833 Forest Circle Dr.  
St. Louis, MO 63128  
*Pro se*

James. M. Crawford  
418 Pine Bend Drive  
Chesterfield, MO 63005  
*Pro se*

J. Douglas Cassity  
P.O. Box 16220  
St. Louis, MO 63105  
*Pro se*

Tony B. Lumpkin, III  
6508 Cuesta Trail  
Austin, TX 78730  
*Pro se*

s/ Wendy B. Fisher  
Wendy B. Fisher  
(Admitted *Pro Hac Vice*)

Attorney for Plaintiffs